ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Date: September 16, 2008
Time: 10:00 A.M. – 4:00 P.M.
Location: IDEM's Shadeland Avenue Offices, Conference Room C

Present at the meeting:
Brett Barber (Greeley & Hansen), Dave Bates (City of Goshen), Patrick Bennett (Indiana Manufacturer's Association (IMA)), Dave Behrens (U.S. Steel), Bill Beranek (Indiana Environmental Institute), Douglas Bley (Arcelor Mittal), Mark Brook (Albert Ettinger (Environmental Law Policy Center (ELPC)), Kari Evans (Barnes & Thornburg), Lori Gates (Christopher Burke Engineering), Vince Griffin (Indiana Chamber of Commerce), Jeff Hyman (Conservation Law Center, Alliance for the Great Lakes), Barton Jones (Strand Associates, Inc.), Kay Nelson (Northwest Indiana Forum), Neil Parke (Eli Lilly), Gary Powdrill (WPCB), Bowden Quinn (Sierra Club Hoosier Chapter), Jim Ray (IDNR-WPCB), Rae Schnapp (Hoosier Environmental Council and Wabash Riverkeepers), Dave Wagner (WPCB).

Representing IDEM: Bruno Pigott, Martha Clark Mettler, Steve Roush, Dennis Clark, Shivi Selvaratnam, John Elliott, John Nixon, and MaryAnn Stevens.

Introductions and Review of Summary
After an introduction by each person in attendance, Martha Clark Mettler, IDEM, Office of Water Quality, Deputy Assistant Commissioner, asked if anyone had comment on the draft summary of the August 12th subgroup meeting. Martha stated that IDEM had received an e-mail from Tim Lohner requesting inclusion into the summary of discussion regarding whether new discharges created as a result of new air pollution control technologies should be exemptions or an alternative antidegradation demonstration. Martha further explained that the draft rule currently includes a margin comment indicating this issue needs more discussion. Kari Evans offered to submit wording to address what Tim Lohner is seeking as revision to the August 12th subgroup meeting summary.

Martha also explained that Jeff Hyman submitted a revised version of the Antidegradation Demonstration Exemption Table contained in the draft meeting summary. Jeff's table expands the number of columns and differs in content as to exemption treatment contained in the draft summary's table. Martha said she likes Jeff's expanded table and opened an invitation for others who may want to submit a version of the table suitable to their interests.

DISCUSSION TOPIC #1: Kentucky Waterways Decision in 6th Circuit Court of Appeals
John Nixon, IDEM Attorney, presented a synopsis of the 6th Circuit Court of Appeals' decision in the Kentucky Waterways, et al. case which addressed antidegradation and de minimis. John's concise description of the court case said that the 6th Circuit Court affirmed Kentucky's decision on its Tier structure of waters but disapproved of the exemptions established by Kentucky. Five of the exemptions established by Kentucky failed to properly address the effects on cumulative assimilative capacity. The sixth exemption was for the coal mining industry, which Kentucky said has well established social benefit. EPA and Kentucky had an "informal commitment" to consider social/economic factors in place, but the court said a rule to implement that consideration is necessary.

Albert Ettinger argued the case for the plaintiffs and declined to lead the discussion in the subgroup setting, but he did state that the lessons from the 6th Circuit court are clear that, in his opinion:

1. It will be hard to get any de minimis greater than 10%.
2. More importantly, cumulative impact of de minimis must be considered.

Kari Evans noted that the court ruling indicates the structure of the state's rule is critical and that the rule development process needs to include EPA. Albert agreed EPA should be in attendance to reign in conversations about aspects of a rule that EPA won't even consider approving such as having RPE as the trigger for an antidegradation review.

Martha mentioned that she has kept EPA Region 5 notified of our rulemaking activities and meeting notes, and she has received Region 5's comments on an earlier version of the draft antideg rule. She also has received EPA's approval of the antidegradation applicability language that the subgroup agreed on at the first subgroup meeting. Martha said EPA has indicated it is willing to attend our rulemaking meetings when we are at an impasse.

DISCUSSION TOPIC #2: Bill Beranek's presentation on de minimis

After the August 12th subgroup meeting, Bill Beranek offered to give a presentation about de minimis. He says his intent is not to influence but to help in the understanding of Steve Roush's charts developed using real permit numbers with the objective of showing the relationship between the WQBEL and de minimis. (Refer to Bill's document, "Thoughts on Meaning of De minimis for Antidegradation", and Steve's charts.)

Bill pointed out that the legal terms don't match the technical terms used in the antideg and de minimis discussions.

Various policy questions need to be answered through the rulemaking process, including:

How to determine the representative background concentration?
How to determine the assimilative capacity of a waterbody?
How to set a cumulative cap on de minimis?
Is 10% the correct de minimis for non-OSRWs?
What is the correct de minimis for OSRWs?
Should the Final Acute Value be the ceiling for the de minimis?
Was 327 IAC 5-2-11.3 a consensus or a mistake in not including the discharger's proposed flow in the facility's design flow?

As the instream concentration of a pollutant increases, there comes a point when the chronic value is replaced by the acute value as the discharge limit.

Flow × criteria = total assimilative capacity

A permit limit developed through the waste load allocation (WLA) assumes the discharger gets 25% of the assimilative capacity. When considering antidegradation, the discharger does not get the 25% assimilative capacity.

A discharger cannot legally discharge above the final acute value (FAV), but a policy decision instituted into rule could allow discharging in excess of the FAV. The policy decision has to be

about the de minimis limit exceeding the FAV when there is very high dilution, but there is not a policy that allows a discharger to exceed the FAV.

What is meant by cumulative de minimis? Albert Ettinger explained that Missouri's antidegradation rule established a baseline when a discharger first applies, then measures against that established amount in subsequent renewal applications.

Layers of conservatism keep the WLA-developed limit more stringent than the criterion.

DISCUSSION TOPIC #3: 327 IAC 5-2-11.3

The existing rule at 327 IAC 5-2-11.3 does not allow a discharger's proposed flow to be included in the design flow for the discharging facility.

Kari Evans says the existing rules were mistaken not to include the proposed flow.

Rae Schnapp says it was not a mistake but a purposeful intention to create an incentive for water conservation. She says policy should not encourage dischargers to use dilution in order to increase the assimilative capacity and thereby meet their discharge limits.

Albert Ettinger provided the example of a 3M facility adding 2 MGD of ground water to dilute its discharge in order to meet its limits.

Jeff Hyman pointed out that the issue of not including the discharger's proposed flow in the facility's design flow is not as important when the receiving waterbody is a high volume water like Lake Michigan, but it is very important in cases of low flow receiving waters. Jeff said it is a cost consideration by dischargers regarding the cost to treat vs. the cost to create a larger assimilative capacity (by adding in dilution water).

Steve Roush summed up the issue with a question of whether the total assimilative capacity or the cumulative cap or the 10% remaining unused loading capacity changes over time.

The subgroup members asked to be able to take the question about including the proposed flow in the calculation of the total assimilative capacity to their larger groups for discussion.

DISCUSSION TOPIC #4: Draft rule language provides a less protective de minimis for OSRWs

On September 9, 2008, Jeff Hyman sent IDEM a document discussing "Explanation of Disparity between Methods of Calculating De Minimis, Plus Additional Comments".

Because Jeff finds that the WQBEL at the end of pipe is less protective for an OSRW than for a non-OSRW, he wants the language of the January 2008 antideg draft rule reinstated so that the de minimis is the background concentration of the pollutant. He believes that would not be contrary to SEA 431, which talks in terms of loading. Jeff compares the current rule at 327 IAC 5-2-11.7 setting background as the de minimis for an OSRW with the current (8-4-08) antideg draft rule that uses the WQBEL as the de minimis. Jeff doesn't believe that SEA 431 prohibits the policy that IDEM has used for years in setting the de minimis for Lake Michigan.

Kari Evans believes that SEA 431 treats OSRW and HQW de minimis the same with the exception that a water quality improvement project is required for a significant lowering of water quality in OSRWs.

DISCUSSION TOPIC #5: What is the correct percent to set for de minimis?
Jeff Hyman, referring to the Kentucky Waterways decision by the 6th Circuit Court of Appeals, said, if the cumulative cap is 10% of the unused loading capacity, then to set the de minimis at 10% would allow the entire de minimis to be consumed in one bite (one discharger).

Albert Ettinger suggested a 5% de minimis as used in Region 8.

Steve Roush said there is no consumption of the assimilative capacity unless the background concentration increases, and, if the background is the de minimis then there is no increase of the assimilative capacity by including the proposed flow.

Jeff suggested using the 7Q10 stream flow to be conservative and the de minimis set at 10% of the median background concentration.

DISCUSSION TOPIC #6: Neil Parke's presentation "Simplified View of Loading Capacity Use in NPDES Permit Limits"
Neil Parke provided the subgroup members with a prepared handout of his simplified view of loading capacity used in NPDES permit limits (see the handout attachment). The point of Neil's presentation is that RPE calculation is very conservative and affords considerable protection to water quality.

Kari Evans added that she doubts the judges in the Kentucky Waterways ruling understood that 10% de minimis is not of the entire stream but of something already small.

Albert Ettinger said he doesn't want to argue RPE again because he doubts RPE as a trigger for antidegradation review will be approved by EPA. Albert's stance is that IDEM should understand the positions of the groups represented by members of the subgroup and should then make a decision and move forward with the rule. Albert thinks Neil's presentation completely eliminates antideg reviews and advises IDEM's decisionmaking, rather than negotiating within the subgroup process.

Jeff Hyman stated that the chance of exceeding the WQBEL isn't the issue; rather, the issue is preserving water quality that is better than the WQBEL. Jeff also asked if the average flow, rather than the 7Q10 flow, were used in Neil's presentation, then how well do Neil's conservative assumptions help to protect water quality.

Albert contends that NPDES permits are based on actual discharge quantities even though the permits are written to allow more discharge of pollutants than the dischargers are actually discharging, which means that, at any time, the dischargers could be adding to the background amounts of pollutants. For this reason, Albert believes permits should be based on background amounts allowed under existing permits.

DISCUSSION TOPIC #7: Should FAV be the ceiling for de minimis?

Or should the ceiling be the acute aquatic criterion (definition from 327 IAC 2-1-9: "Acute aquatic criterion" or "AAC" means the highest concentration of chemical that if met instream will protect the aquatic life present from mortality or other irreversible effects due to short term exposure. The AAC is equal to one-half (½) the final acute value (FAV).")

Or should the ceiling be a chronic value, as suggested by Jeff Hyman, such as the chronic aquatic criterion (definition from 327 IAC 2-1-9: "Chronic aquatic criterion" or "CAC" means the highest concentration of chemical that if met instream will protect the aquatic life present from toxic effects due to long term exposure, for example, adverse effects on growth and reproduction.")

DISCUSSION TOPIC #8: Homework assignment

Martha set a homework assignment to be completed by each of the groups represented by the subgroup members. She agreed to create a template and provide it to the subgroup members for completion of the homework assignment by October 15, 2008, and submission to MaryAnn Stevens who would then distribute all completed assignments prior to the next subgroup meeting on October 30, 2008.

The homework assignment concerns the unanswered policy questions discussed but not resolved at this subgroup meeting:

How to determine the representative background concentration?
How to determine the assimilative capacity of a waterbody?
How to set a cumulative cap on de minimis?
Is 10% the correct de minimis for non-OSRWs?
What is the correct de minimis for OSRWs?
Should the Final Acute Value be the ceiling for the de minimis?
Was 327 IAC 5-2-11.3 a consensus or a mistake in not including the discharger's proposed flow in the facility's design flow?

NEXT STEPS

The next subgroup meeting will be on Thursday, October 30, 2008, from 10 am to 4 pm, tentatively to be located at IDEM's Shadeland Avenue office, Conference Room C.

IDEM will send out a template as a guide for the represented groups to prepare their homework assignment/presentation on the proposed questions. (MaryAnn Stevens sent this template via e-mail to the subgroup members on Wednesday, September 17, 2008.)

Kari Evans is to submit wording to address Tim Lohner's request to revise the summary of the August 12, 2008, subgroup meeting.

Responses from subgroup members after taking the issue of 327 IAC 5-2-11.3 to their larger workgroup members to discuss whether a discharger's proposed flow should be included in the design flow for the discharging facility.

Summary of Subgroup Consensus from this Meeting

No agreements were reached at this subgroup meeting.